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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 RASHAD HARPER, ) NO. CV 17-2209-JFW(E)  
12 Plaintiff, )  
13 v. ) MEMORANDUM AND ORDER DISMISSING  
14 D. ASUNCION, et al., ) COMPLAINT WITH LEAVE TO AMEND  
15 Defendants. )  
16 \_\_\_\_\_ )  
17

18 BACKGROUND  
19

20 Plaintiff, a state prisoner proceeding in forma pauperis, brings  
21 this civil rights action pursuant to 42 U.S.C. section 1983 against  
22 prison officials at the California State Prison at Lancaster. The  
23 Complaint consists of a form Complaint and a handwritten attachment.  
24 Defendants are: (1) Warden Debbie Asuncion; (2) Sergeant Karla Graves;  
25 (3) Lieutenant J. Varela; (4) Captain Williams; and (5) Correctional  
26 officers Roldan, Robles, Chrinos and Ortega. Plaintiff sues all  
27 Defendants in their individual capacities only.

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1 On August 3, 2017, Defendants filed a "Motion to Dismiss  
2 Plaintiff's Complaint, etc." On September 11, 2017, Plaintiff filed  
3 "Plaintiff's Opposition, etc."

4  
5 **SUMMARY OF PLAINTIFF'S ALLEGATIONS**  
6

7 Plaintiff's claims concern a fall Plaintiff assertedly suffered  
8 on February 29, 2016. Plaintiff alleges that, on February 18, 2016,  
9 prior to the alleged fall, Plaintiff assertedly transferred to a new  
10 building and cell (Complaint, attached "Additional Supporting Facts,"  
11 ¶ 1). Plaintiff assertedly noticed immediately that the upper tier  
12 had flooded with water from the shower and that Plaintiff's cell was  
13 flooding (id., ¶ 1). Plaintiff's cellmate allegedly told Plaintiff  
14 that this condition had been going on "[a]lmost a year" (id.).  
15 Plaintiff and his cellmate allegedly told Defendants Roldan, Chrinos,  
16 Robles and Ortega that the shower needed to be fixed because water  
17 assertedly was flooding the tier and their cell (id., ¶ 2).  
18 Defendants allegedly said they would submit a work order to the  
19 maintenance department to have the shower fixed and that in the  
20 meantime Plaintiff and his cellmate could use a mop to clean up the  
21 water in front of their cell (id.).  
22

23 On February 19, 2016, Plaintiff and his cellmate allegedly  
24 complained again about water from the shower assertedly flooding the  
25 tier and their cell (id., ¶ 3). Defendants allegedly gave the same  
26 response "and nothing was ever done" (id.).  
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1 On February 20, 2016, Plaintiff sent an Inmate Request for  
2 Interview to Defendant Graves, assertedly informing her of the  
3 flooding problem, asking that it be fixed, and allegedly adding that  
4 the condition was "very hazardous & dangerous to inmates & employees"  
5 (id., ¶ 4 & Ex. A, p. 1). Plaintiff allegedly never received a  
6 response (id., ¶ 4).

7  
8 On February 22, 2016, Plaintiff allegedly sent an Inmate Request  
9 for Interview to Defendant Varela concerning the asserted flooding  
10 problem, but Plaintiff claims he never received a response (id., ¶ 5 &  
11 Ex. A, p. 2). On February 25, 2016, Plaintiff allegedly sent an  
12 Inmate Request for Interview to Defendant Williams requesting that the  
13 shower be fixed, to which Plaintiff allegedly never received a  
14 response (id., ¶ 6 & Ex. A, p. 3). On February 28, 2016, Plaintiff  
15 allegedly sent an Inmate Request for Interview to Defendant Asuncion  
16 requesting that the shower be fixed, but Plaintiff claims he did not  
17 receive a response (id., ¶ 7). The shower allegedly never was fixed  
18 (id., ¶ 6 & Ex. A, p. 4).

19  
20 On February 29, 2016, Plaintiff allegedly was returning to his  
21 cell when he assertedly slipped in "an extreme amount of water" on the  
22 tier (id., ¶ 8). Plaintiff allegedly landed on his lower back and hit  
23 his head on the ground (id.). Defendants Roldan, Robles, Chrinos and  
24 Ortega allegedly came up the stairs (id.). Defendant Roldan allegedly  
25 asked Plaintiff if Plaintiff was okay, and Plaintiff reportedly said  
26 no (id.) Plaintiff allegedly said he could not move his back or feel  
27 his legs (id.). Plaintiff reportedly was placed on a gurney and taken  
28 to the triage center to await an ambulance (id.). Plaintiff allegedly

1 was transported to the hospital and received a "catscan," the results  
2 of which assertedly were negative (id., ¶ 9). Plaintiff allegedly was  
3 discharged from the hospital the next day (id.). On April 21, 2016,  
4 Plaintiff reportedly was diagnosed with left sciatica piriformis  
5 syndrome and was instructed to do exercises to help repair the sciatic  
6 nerve damage (id., ¶ 11).

7  
8 Plaintiff attaches to the Complaint copies of purported Inmate  
9 Requests for Interview, addressed to Defendants Graves (on  
10 February 20, 2016), Varela (on February 22, 2016), Williams (on  
11 February 25, 2016) and Asuncion (on February 28, 2016) (Complaint, Ex.  
12 A, pp. 1-4). These Requests state that water purportedly was spraying  
13 from the shower into the tier, flooding Plaintiff's cell and creating  
14 a condition that was "very dangerous to inmates and employees" (id.).  
15 Plaintiff also attaches various alleged grievance documents, including  
16 a first level review decision stating that inspection of the showers  
17 supposedly showed no indications of flooding or safety hazards and  
18 that the shower drainage was working properly (id., pp. 11-12). The  
19 second and third level appeal decisions allegedly stated that the  
20 plumbing issue had been addressed, citing a work order number (id.,  
21 pp. 13-16).

22  
23 Plaintiff seeks declaratory relief and compensatory and punitive  
24 damages (form Complaint, p. 6).

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## STANDARDS GOVERNING MOTION TO DISMISS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and internal quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The Court must accept as true all non-conclusory factual allegations in the complaint and must construe the complaint in the light most favorable to the plaintiff. Erickson v. Pardus, 551 U.S. 89, 94 (2007); Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 989 (9th Cir. 2009).

"Generally a court may not consider material beyond the complaint in ruling on a Fed.R.Civ.P. 12(b)(6) motion." Intri-Plex Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th Cir. 2007) (citation and footnote omitted); see also Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (on a motion to dismiss, the court may consider "only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice") (citation omitted); Schneider v. Cal. Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1988) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the Complaint to a plaintiff's moving papers, such as memorandum in opposition to a defendant's motion to dismiss.") (emphasis in

1 original). However, the Court may consider facts raised for the first  
2 time in an opposition in determining whether to grant leave to amend.  
3 See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).  
4

5 The Court may not dismiss a pro se complaint without leave to  
6 amend unless "it is absolutely clear that the deficiencies of the  
7 complaint could not be cured by amendment." Karim-Panahi v. Los  
8 Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988) (citations and  
9 quotations omitted); see also Lopez v. Smith, 203 F.3d 1122, 1130 (9th  
10 Cir. 2000) (en banc) (district court should grant leave to amend  
11 "unless it determines that the pleading could not possibly be cured by  
12 the allegation of other facts") (citation and internal quotations  
13 omitted).  
14

#### 15 DEFENDANTS' CONTENTIONS

16

17 Defendants contend:

18

19 1. The Complaint allegedly fails to state an Eighth Amendment  
20 claim;  
21

22 2. Plaintiff allegedly has failed to plead facts to support the  
23 supervisorial liability of Defendants Asuncion, Graves, Williams and  
24 Varela; and  
25

26 3. Defendants allegedly are entitled to qualified immunity.

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## DISCUSSION

Prison conditions violate the Eighth Amendment if they are incompatible with "the evolving standards of decency that mark the progress of a maturing society." Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Prison officials may not deprive prisoners of the "minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825, 834 (1994) (internal quotations and citations omitted). The Eighth Amendment "requires that inmates be furnished with the basic human needs, one of which is reasonable safety." Helling v. McKinney, 509 U.S. 25, 33 (1993) (citation and internal quotations omitted).

To state an Eighth Amendment claim, a plaintiff must allege that prison officials' conduct was sufficiently harmful to establish a constitutional violation (the "objective" test), and that the officials acted with a sufficiently culpable state of mind (the "subjective" test). See Wilson v. Seiter, 501 U.S. 294, 298 (1991); Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000), cert. denied, 532 U.S. 1065 (2001). The objective test looks to whether the deprivation was sufficiently serious, as determined by the conditions alleged. See Farmer v. Brennan, 511 U.S. at 834; Johnson v. Lewis, 217 F.3d at 731. The plaintiff must allege conditions so serious as to be outside the bounds of those which "today's society chooses to tolerate." Helling v. McKinney, 509 U.S. at 36. The Eighth Amendment does not require that prisons or jails be "comfortable nor that they provide every amenity that one might find desirable." Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

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1 Under the subjective test, deliberate indifference is the minimum  
2 showing of culpability necessary to state a claim. See Farmer v.  
3 Brennan, 511 U.S. at 834; Estelle v. Gamble, 429 U.S. 97, 104 (1976).  
4 To be liable for "deliberate indifference," a prison official must  
5 "both be aware of facts from which the inference could be drawn that a  
6 substantial risk of serious harm exists, and he must also draw the  
7 inference." Farmer v. Brennan, 511 U.S. at 837. "[A]n official's  
8 failure to alleviate a significant risk that he should have perceived  
9 but did not, while no cause for commendation, cannot . . . be  
10 condemned as the infliction of punishment." Id. at 838. Allegations  
11 of negligence do not suffice to plead deliberate indifference. See  
12 Estelle v. Gamble, 429 U.S. at 105-06.

13  
14 Numerous courts, including the Ninth Circuit, have held that  
15 conditions leading to a slip and fall in prison, without more, do not  
16 violate the Eighth Amendment. See LeMaire v. Maass, 12 F.3d 1444,  
17 1457 (9th Cir. 1993) ("slippery prison floors . . . do not state even  
18 an arguable claim for cruel and unusual punishment") (citation and  
19 internal quotations omitted); Jackson v. Arizona, 885 F.2d 639, 641  
20 (9th Cir. 1989), superseded by statute as stated in Lopez v. Smith,  
21 203 F.3d 1122, 1130-31 (9th Cir. 2000) (same)); Oubichon v. Carey,  
22 2017 WL 2162940, at \*8 (E.D. Cal. May 17, 2017) (citing cases); see  
23 also Pyles v. Fahim, 771 F.3d 403, 410 & n.25 (7th Cir. 2014)  
24 ("Federal courts consistently have adopted the view that slippery  
25 surfaces and shower floors in prisons, without more, cannot constitute  
26 a hazardous condition of confinement.") (collecting cases; footnote  
27 omitted); Reynolds v. Powell, 370 F.3d 1028, 1031 (10th Cir. 2004)  
28 ("Simply put, a slip and fall, without more, does not amount to cruel



1 and unusual punishment.") (citation and internal quotations omitted);  
2 Mitchum v. Honea, 2017 WL 1166133, at \*2 (E.D. Cal. Mar. 29, 2017)  
3 ("Courts have routinely held that slip and fall injuries do not give  
4 rise to cognizable constitutional claims and instead sound in  
5 negligence.") (citations omitted).

6  
7 In some instances, a slippery prison floor lacking protective  
8 measures may create a sufficient danger to warrant relief where the  
9 plaintiff has some known exacerbating condition. See, e.g., Frost v.  
10 Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998) (prison officials were  
11 aware that disabled inmate on crutches lacked accessible shower  
12 facilities and repeatedly suffered falls due to a slippery bathroom  
13 floor; in these conditions, slippery floors without protective  
14 measures could "create a sufficient danger to warrant relief,"  
15 distinguishing LeMaire v. Maass); see also Anderson v. Morrison, 835  
16 F.3d 681, 683 (7th Cir. 2016) (allegations that prisoner slipped on  
17 stairs slicked with milk and several days' worth of food and rubbish  
18 after being required to descend stairs unaided and handcuffed behind  
19 his back sufficient).

20  
21 In the present case, however, Plaintiff alleges merely a slip and  
22 fall on a wet floor. These allegations, without more, are  
23 insufficient to show a constitutional violation. See Edwards v. Clark  
24 County, 2016 WL 866302, at \*5 (D. Nev. Mar. 2, 2016), aff'd, \_\_\_ Fed.  
25 App'x \_\_\_, 2017 WL 3530895 (9th Cir. Aug. 17, 2017) (slip and fall due  
26 to puddled water previously reported to defendants not  
27 unconstitutional, where plaintiff did not allege any exacerbating  
28 condition or previous falls); Gilman v. Woodford, 2006 WL 1049739, at

1 \*4 (E.D. Cal. Apr. 20, 2006), adopted, 2006 WL 1653131 (E.D. Cal.  
2 June 14, 2006), aff'd, 269 Fed. App'x 756 (9th Cir. 2008) (slippery  
3 floor caused by leaky roof not unconstitutional; distinguishing Frost  
4 v. Agnos because Gilman was not handicapped and did not suffer  
5 repeated injuries); York v. Peters, 2014 WL 848643, at \*4-5 (D. Or.  
6 Mar. 4, 2014) (slippery floor not unconstitutional where plaintiff  
7 demonstrated "no special susceptibility" to slipping and falling of  
8 which defendants had notice). As indicated above, mere allegations of  
9 negligence do not suffice to plead deliberate indifference. See  
10 Estelle v. Gamble, 429 U.S. at 105-06.

11  
12 Additionally, Plaintiff has failed to plead the requisite  
13 subjective deliberate indifference. Plaintiff alleges that, when  
14 Plaintiff first complained to Defendants Roldan, Chrinos, Robles and  
15 Ortega, those Defendants told Plaintiff that they would submit a work  
16 order to the maintenance department to have the shower fixed and that  
17 in the meantime Plaintiff and his cellmate could use a mop to clean up  
18 the water in front of their cell. It appears from attachments to the  
19 Complaint that the work order was submitted and that repairs  
20 eventually were undertaken. Plaintiff's allegations show that  
21 Defendants Chrinos, Robles and Ortega assertedly undertook to attempt  
22 to ameliorate the problem and did not deliberately disregard any  
23 serious threat of harm to Plaintiff. Plaintiff alleges no facts from  
24 which Defendants' subject deliberate indifference reasonably might be  
25 inferred.

26  
27 Additionally, Plaintiff may not sue any supervisor pursuant to 42  
28 U.S.C. section 1983 on a theory of respondeat superior. See Ashcroft

1 v. Iqbal, 556 U.S. at 676 ("Government officials may not be held  
2 liable for the unconstitutional conduct of their subordinates on a  
3 theory of respondeat superior") (citations omitted); Polk County v.  
4 Dodson, 454 U.S. 312, 325 (1981). A supervisor "is only liable for  
5 his or her own misconduct," and is not "accountable for the misdeeds  
6 of [his or her] agents." Ashcroft v. Iqbal, 556 U.S. at 677. Mere  
7 knowledge of a subordinate's alleged misconduct is insufficient. Id.  
8 at 1949.

9  
10 Plaintiff alleges that in the eight days prior to the alleged  
11 incident Plaintiff sent inmate requests to the supervisor Defendants  
12 concerning water on the tier floor but received no response.  
13 Plaintiff's allegations do not suffice to show that the supervisor  
14 Defendants subjectively knew of and disregarded any serious risk of  
15 harm to Plaintiff, particular in light of Plaintiff's allegations that  
16 the officer Defendants told Plaintiff they would submit a work order  
17 to correct the problem and offered Plaintiff the use of a mop to clean  
18 up the water in front of the cell.

19  
20 **ORDER**

21  
22 The Complaint is dismissed with leave to amend.<sup>1</sup> If Plaintiff  
23 still wishes to pursue this action, he is granted thirty (30) days  
24 from the date of this Order within which to file a First Amended  
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26 <sup>1</sup> In light of the dismissal of the Complaint with leave  
27 to amend, the Court will not determine the issue of qualified  
28 immunity pending the filing of an amended pleading setting forth  
a cognizable claim for relief. See Mack v. Calif. Dep't of  
Corrections and Rehabilitation, 2016 WL 4000128, at \*8 (E.D. Cal.  
July 25, 2016).

1 Complaint. Any First Amended Complaint shall be complete in itself  
2 and shall not refer in any manner to any prior complaint. Plaintiff  
3 may not add Defendants without leave of Court. See Fed. R. Civ. P.  
4 21. Failure to file timely a First Amended Complaint may result in  
5 the dismissal of this action. See Pagtalunan v. Galaza, 291 F.3d 639,  
6 642-43 (9th Cir. 2002), cert. denied, 538 U.S. 909 (2003) (court may  
7 dismiss action for failure to follow court order); Simon v. Value  
8 Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir.), amended, 234  
9 F.3d 428 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001),  
10 overruled on other grounds, Odom v. Microsoft Corp., 486 F.3d 541 (9th  
11 Cir.), cert. denied, 552 U.S. 985 (2007) (affirming dismissal without  
12 leave to amend where plaintiff failed to correct deficiencies in  
13 complaint, where court had afforded plaintiff opportunities to do so,  
14 and where court had given plaintiff notice of the substantive

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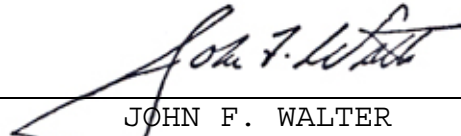
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1 problems with his claims); Plumeau v. School District #40, County of  
2 Yamhill, 130 F.3d 432, 439 (9th Cir. 1997) (denial of leave to amend  
3 appropriate where further amendment would be futile).

4  
5 IT IS SO ORDERED.

6  
7 DATED: September 29, 2017.

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11 \_\_\_\_\_  
JOHN F. WALTER  
UNITED STATES DISTRICT JUDGE

12 PRESENTED this 26th day  
13 of September, 2017 by:

14  
15 \_\_\_\_\_  
/s/  
16 CHARLES F. EICK  
UNITED STATES MAGISTRATE JUDGE